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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 72-1652

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*

vs.

MARCIANO HAW HIBI, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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In a *per curiam* opinion dated October 23, 1973, the Court granted the Government's petition for a writ of certiorari and without hearing argument summarily reversed the judgment of two courts below which had granted respondent's petition for naturalization.

At issue is whether the Government can deny the applicability of section 702 of the Nationality Act of 1940, a provision offering American citizenship to cer-

tain non-citizens, respondent among them, who were to serve honorably with the armed forces of the United States overseas during World War II.

Though the statute expired in 1946, long before respondent filed his application for naturalization, the courts below estopped the Government from asserting the statute's expiration date because the Commissioner of Immigration had taken certain actions which were specifically designed to and did in fact prevent respondent from applying in 1945. This Court reversed, finding that the Commissioner's actions did not constitute the kind of "affirmative misconduct" which might estop the Government from denying respondent American citizenship.

For the reasons which follow, respondent now asks the Court to set aside that part of its decision reversing the judgment below, to permit the filing of briefs and presentation of oral argument. Respondent further requests an opportunity to appear for oral argument on this petition for rehearing.

I

The issue of estoppel against the Government obviously was considered sufficiently important by the Court to grant certiorari. Yet the Court's opinion does not touch upon the fundamental conflict of interests which the issue presents, the question of fair play between the individual and his government and whether and under what circumstances even fair play may be compelled to give ground to a more important public interest.

No case could better illustrate the nature of that issue than this. For the undisputed record establishes the commission of an intentional act on the part of a high administrative official for the express purpose of denying an individual's legal right to apply for citizenship but for reasons the official considered to be in the public interest.

Throughout the proceedings below as well as in the Government's certiorari petition and in respondent's reply to it, the issue has always been presented in those terms. The Government has never denied that it was the affirmative act of the Commissioner of Immigration in revoking the authority of his naturalization representative in the Philippines in 1945 which prevented respondent from being naturalized. Instead, the Government has always sought to justify that act as being authorized by statute or implied from the Executive's authority in the field of foreign affairs.

Respondent won the unanimous judgment of two courts below upon the issue presented in the foregoing context. If this Court now chooses to resolve the issue on a new and different basis, i.e., whether the Commissioner's action constituted "affirmative misconduct," then it should at least permit the filing of briefs and presentation of argument directed toward the meaning of, and circumstances governing, the applicability of such a standard.

II

The expression "affirmative misconduct" has never before appeared in any decision concerned with the

issue of estoppel against the Government. This Court's use of that expression for the first time leaves unanswered a number of pertinent questions.

For example, is a finding of "affirmative misconduct" dependent upon the motivation or state of mind of the official involved? Can something less than "affirmative misconduct" ever give rise to an estoppel against the Government? Does the answer depend on the nature of the public interest to be served? Might not a failure to act, such as a deliberate failure to carry out a statutory duty, also be described as "affirmative" misconduct?

The answers to these questions are important because the word "misconduct" ordinarily implies a conscious or wilful wrongdoing. Yet the issue of estoppel against the Government is rarely prompted by anything more than an official's innocent misconception of the law.

Respondent has previously cited a list of cases estopping the Government in immigration and citizenship matters.[1] In none of them does it appear that the government official consciously intended to prejudice

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[1] *Hetzer v. I.&N.S.*, 420 F.2d 357 (9th Cir. 1965);
Tejeda v. I.&N.S., 346 F.2d 389 (9th Cir. 1965);
McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960);
Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954);
Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950);
Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D.C. Hawaii 1951);
Lee Hong v. Acheson, 110 F. Supp. 60 (D.C.N.D. Cal. 1953).

the party involved. Not even in *Montana v. Kennedy*, 366 U.S. 308, 314, 315, the case cited in the Court's opinion as illustrating the kind of misconduct which might estop the Government, can it be said the government official was guilty of a consciously wrongful act.

It is therefore difficult to understand how the events of *Montana v. Kennedy*, supra, might constitute "affirmative misconduct" when the events of this case apparently do not. In *Montana*, there was only an unsubstantiated allegation made by a lady who apparently took the ambiguous statement of an American Consul to mean he would not issue her a passport. But here, the undisputed record establishes that the Commissioner of Immigration acted deliberately and intentionally and for the express and specific purpose of denying Filipino soldiers their right to apply for American citizenship, a right the Commissioner knew them to have and which he knew they would lose as a result of his *affimative* act of withdrawing the authority of his naturalization representative.

III

It is incorrect, therefore, to characterize the actions of the Commissioner of Immigration as an unintentional failure to publicize the rights of Filipino soldiers or as a failure to keep a naturalization officer in the Philippines during "all of the time" respondent was eligible. The conduct of the Commissioner, i.e., the revocation of the naturalization officer's authority when he had barely begun to naturalize soldiers in the

Philippines, was misconduct of the most affirmative kind.

If the "affirmative misconduct" of its officials must indeed be established in order to estop the Government, and if the Supreme Court of the United States cannot discover that kind of misconduct in the circumstances of this case, then what recourse can there be for any individual who finds himself aggrieved by the Government.

Petitions for rehearing, we know, are not meant to re-argue lost causes, and the Court has already rendered its opinion. Nevertheless, we trust that such an admonition will not apply to the discussion which follows, for this respondent has not had a hearing at all. Therefore, we respectfully ask the Court to reconsider the following circumstances in light of the foregoing discussion concerning the meaning and applicability of the "affirmative misconduct" standard.

1. The Commissioner of Immigration, as the Court's opinion itself notes, was charged by Congress with administering the offer of citizenship proclaimed by section 702. If this means anything at all, it means the Commissioner had a plain duty to make a naturalization representative available to qualified servicemen.

2. Respondent was qualified and would have accepted that offer had the means, i.e., the presence of a naturalization officer, been made available to him. The District Court found that to be the fact.

3. No sooner had the naturalization officer begun his work in the Philippines than his authority was revoked by the Commissioner of Immigration.

4. The wrong done to respondent cannot be characterized in terms of inadvertent or excusable failures. This was not a mere failure to publicize respondent's rights or a mere failure to keep a naturalization officer in the Philippines during "all of the time" respondent was eligible. Rather, the wrong done to him was the conscious, intentional, deliberate and affirmative act of withdrawing the naturalization officer just when respondent might have applied. Moreover, this was done for the express and specific purpose of doing exactly what it did do—to prevent respondent from asserting a right that was legally his.

In other words, there is a big difference between a good faith, but unsuccessful effort, to naturalize those who might qualify and an obligation to refrain from actively and intentionally blocking qualified servicemen from access to the person whose job it was to naturalize them.

IV

Ultimately the issue is whether the Government of the United States shall be held to its promise. That issue need not be expressed in terms of estoppel at all. "Great nations, like great men," this Court has said, "should keep their word." *Astrup v. I.&N.S.*, 91 S.Ct. 1583, 1586.

This respondent put his life on the line for the United States during the darkest moments of the war.

He has kept his half of the bargain. He has won t
right to citizenship by unanimous judgment of t
two courts below. Has he not earned the right a
to be fully heard by this Court?

Dated, San Francisco, California,
November 14, 1973.

DONALD L. UNGAR,
Attorney for Respondent
Marciano Haw Hibi.

ESTHER M. KAUFMAN,
Of Counsel.

Certificate of Counsel

As counsel for respondent, I hereby certify that I am a member in good standing of the Supreme Court of the United States and that this petition for rehearing is presented in good faith and not for delay.

Dated, San Francisco, California,
November 14, 1973.

Donald L. Ungar,
Attorney for Respondent
Marciano Haw Hibi.